IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
Petitioners,

vs.

ABBOTT LAWRENCE MILLS,
Respondent.

OPPOSING BRIEF OF RESPONDENT.

ROBERT A. GRANT,
Counsel for Respondent.

LOUIS M. HAMMERSCHMIDT,
MILTON A. JOHNSON,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Statement	1
New Matter disclosing Priority question is moot	2
Argument:	
I. The decision of the Circuit Court of Appeals that the judgment rendered against a receiver after his discharge is not void, is not in conflict with its own prior decision and with decisions of other Circuit Courts of Appeals	3
II. The decision of the Circuit Court of Appeals is not contrary to decisions of this Court	6
III. The decision of the Circuit Court of Appeals that the judgment rendered against a receiver of a street railway corporation for negligence arising in the operation of the property, after his discharge and after all the trust property has been distributed by him, is not void, is a decision of an important question of local law, but is not in conflict with local law	8
IV. The decision of the Circuit Court of Appeals which holds that a judgment secured after the discharge of the receiver and without substitution of the purchaser is valid against the purchaser, is not in conflict with an applicable local decision of the Supreme Court of Indiana	11
V. The Federal District Court did not lose jurisdiction by the appointment of a receiver in the State Court on December 28, 1931	13
VI. The decision of the Circuit Court of Appeals holding that plaintiff has a lien on the property is not in conflict with the decision of this Court.	17
VII. The Girard Trust Co., Trustee, has had no property taken without due process of law	18
Conclusion	19
Appendix	21

TABLE OF CASES CITED.

Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129..... 4, 9
Brown v. Crawford, 254 Fed. 146..... 17
Brown v. Winterbottom, 98 Ohio St. 127, 120 N. E. 292 19
Burns Indiana Statutes Ann. 1933, Sec. 2-227..... 3, 9
Byers v. McAuley, 149 U. S. 607, 37 L. Ed. 867..... 17
Central Trust Co. v. St. Louis A. & T. R. Co., 41 Fed. 551 11
Citizens Trust Co. v. National Equipment Co., 178 Ind. 167, 98 N. E. 865 18
City of Anderson v. Fleming, 160 Ind. 597, 67 N. E. 443 12
Dillingham v. Hawk, 60 Fed. 494, 23 L. R. A. 517..... 11
Dowell v. Applegate, 152 U. S. 327, 38 L. Ed. 463.... 11
Ex Parte Baldwin, 291 U. S. 610, 78 L. Ed. 1020..... 13
Field v. Kansas City Ry. Co., 9 Fed. (2d) 213..... 13
Gray v. Grand Trunk W. Ry. Co., 156 Fed. 736..... 4
Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. Ed. 972 11
Henry v. Claffey, 189 Ind. 609.....8, 10, 12
In re: Appleman, 176 Ind. 253, 94 N. E. 566..... 11
In re: Putnam, 55 Fed. (2d) 73..... 13
Johnson v. Central Trust Co., 159 Ind. 605..... 8
Julian v. Central Trust Co., 193 U. S. 93, 48 L. Ed. 629 .....7, 16
Lion Bonding Co. v. Karatz, 262 U. S. 77, 67 L. Ed. 871 13
Montgomery v. Vicory, 110 Ind. 211, 11 N. E. 38.....5, 12
McCullough v. Union Traction Co., 206 Ind. 585, 186 N. E. 300 .....18, 19
McNulta v. Lockridge, 141 U. S. 327..... 6
National Metal Co. v. Greene Cons. Cooper Co., 11 Ariz. 108, 89 Pac. 535..... 12

Penn General Gas Co. v. Penn, 294 U. S. 189, 79 L. Ed. 850 ..... 6, 12
Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435..... 14
Peters v. Plains Petroleum Co., 43 Fed. (2d) 49..... 4
Railway Steel Spring Co. v. Chicago & E. I. Ry. Co., 12 Fed. (2d) 430..... 5, 12
Reihl v. Margolias, 279 U. S. 218..... 17
Reynolds v. Stockton, 140 U. S. 254..... 5
Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427..... 6, 12
St. Louis U. T. Co. v. San Benito Land & Water Co., 4 Fed. (2d) 1007 ..... 6, 12
Shepherd v. St. Louis Pub. Ser. Co., 64 Fed. (2d) 612 ..... 3, 4, 8
Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660..... 13
Shugart v. Mills, 125 Ind. 445, 25 N. E. 551..... 6
Smith v. Mills, 98 Ind. App. 543, 185 N. E. 327.... 4, 6, 8, 11
Smith v. Missouri Pac. R. Co., 266 Fed. 653..... 17
State ex rel. Elder v. Circuit Court of Madison Co., 212 Ind. 1, 5 N. E. (2d) 641..... 7
Wabash R. R. Co. v. Adelbert College, 208 U. S. 37, 52 L. Ed. 379 ..... 7, 14, 15, 16
Washington Gas Light Co. v. D. C., 161 U. S. 316, 40 L. Ed. 712 ..... 6, 12
Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666..... 17
Western N. Y. & P. R. Co. v. Penn Refining Co., 137 Fed. 343 4
Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845..... 11
Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131..... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA RAILWAY, INC., NORTHERN INDIANA RAILWAY, INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
Petitioners,

vs.

ABBOTT LAWRENCE MILLS,
Respondent.

OPPOSING BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The statement of the petitioners omitted the following facts which are undisputed:

1. An allowance of fees was made to counsel in the United States District Court for the trial of the negligence case in the State Court prior to the discharge of the receiver on October 30, 1930, the date the trial in the State Court began. In the subsequent appeal to the Appellate and the petition to transfer to the Supreme Courts of Indiana, the Northern Indiana Railway Company, (the purchaser) or its receiver appointed by the St. Joseph Circuit Court, provided the funds for the expense of said appeal and transfer. (R. 125.)

2. The claims attorney of the Northern Indiana Railway, Inc., rendered services at the negligence trial which were paid by said corporation, the purchaser (R. 126) and the same attorneys continued in that litigation. (R. 126.)

3. The plaintiff, Mills, had no actual knowledge of the entry of the order discharging the receiver of the Chicago, South Bend & Northern Indiana Railway Company in the District Court. (R. 126.)

4. During the receivership in the District Court the Girard Trust Company was paid interest on its mortgage in the sum of $125,000. (R. 95.)

5. During the receivership in the District Court over $415,000 was expended for betterments on the line of the railroad. (R. 122-123.)

6. The sum of $153,359.01 in cash was turned over by the receiver of the Chicago, South Bend & Northern Indiana Railway Company to the purchaser, Northern Indiana Railway, Inc. (R. 110-111.)

New Matter Disclosing Priority Question Is Moot.

Subsequent to the filing of this case and prior to the disposition in the Circuit Court of Appeals in the proceedings brought in the St. Joseph Circuit Court, the parties to said proceedings agreed in a plan of reorganization approved by the court that the holders of preferred claims against the old company, if any, as determined by the court, shall be paid the amount thereof, in cash, upon consummation of the plan. In the footnote of Article III of the plan of reorganization, the judgment involved in this proceeding is specifically referred to and this language used:

> "If an appeal is taken and further if the plaintiff's alleged lien is sustained, it will be paid in cash under the provisions of Article III."

(See certified copy of Article III and footnote, appended hereto.)

Point I.

The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver After His Discharge Is Not Void, Is Not in Conflict With Its Own Prior Decision and With Decisions of Other Circuit Courts of Appeals.

Petitioners are attempting in their brief to take two positions: (1) that the situation is controlled by the federal laws under this point; and (2) that the question is one of local law, under point III. As far as respondent is concerned, we shall not discuss the question of whether the Circuit Court of Appeals followed the local or federal decisions as in either event the Circuit Court of Appeals was correct in its decision.

Petitioners under this point cite four cases. Not one of these cases is in point. The case of *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2d) 612, might have been some authority for appellees' position if the Missouri statutes concerning transfer of interest were similar to the Indiana statutes, but they are dissimilar. The Missouri statute provided that where an interest is transferred, the action shall be continued in the name of the original party, if the party to whom the transfer is made will indemnify the nominal party against costs and damages or the court may allow substitution and in all such cases the party to whom the transfer is made shall be required, upon application of the party who made the transfer, either to give indemnity or cause himself to be substituted, and upon his omission, the suit to be dismissed. The Indiana statute affirmatively and mandatorily provides that no action shall abate by the transfer of any interest therein, and that the action shall be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action. (Burns Ind. St. Ann. 1933, 2-227.)

The result reached in the *Shepherd* case was based upon the state law, and the court specifically, at page 615 of that case, states that whether or not the appellant's judgment is valid, is determined by the state law. The mandatory provision of the Indiana statute is seen in the case of *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129. We cannot refrain from strenuously urging that in this case a statute which provided that the action *may* be continued was held of sufficient force that a judgment such as in the case at bar was valid. The Indiana statute provides that no action *shall* abate. It is irrefutable that the *Shepherd* v. *St. Louis Public Service Co.,* 64 Fed. (2d) 612, and *Baer* v. *McCullough,* 176 N. Y. 97, 68 N. E. 129, are not contra. They are distinguished by reason of difference in the statutes, as pointed out by the court in its opinion in the *Shepherd* case.

The case of *Peters* v. *Plains Petroleum Co.,* 43 Fed. (2d) 49, likewise is not in point. In that case the question of the discharge of the receiver was raised in the case against the receiver. The cause turned upon a release and the interpretation thereof. In the case at bar the Appellate and Supreme Courts of Indiana have upheld the validity of the judgment against the receiver. *Smith* v. *Mills,* 98 Ind. App. 543, 185 N. E. 327. The first time the question of the right to sue the receiver was raised was in the proceedings in this case. This is a collateral attack on a judgment of the courts of Indiana.

In the case of *Western New York & P. R. Co.* v. *Penn Refining Co.,* 137 Fed. 343, the receiver was discharged four years before the action was begun. The question of the power to sue the receiver was raised in the suit and not in a collateral attack. In the case at bar there is no question that the suit was begun while the receiver was in actual possession, control and operation of the property. Petitioner also cites *Gray* v. *Grand Trunk W. Ry. Co.,* 156 Fed. 736, but in that case as in the *Western New York & P. R. Co.* v. *Penn Refining Co.,* the action was brought after the

discharge of the receiver. In their discussion petitioners state that there is no statement in the evidence or averment in the pleading that the plaintiff did not have knowledge of the discharge of the receiver. The record contradicts petitioners' statement. Plaintiff had no actual knowledge of the discharge. (R. 126.)

Petitioners also rely on *Reynolds* v. *Stockton*, 140 U. S. 254, but in that case there was a clear distinction. There the question of the authority of an ancillary receiver to bind the primary receiver is involved. Then again this Court points out that there was no authoritative appearance on behalf of the primary receiver. In the case at bar there was an authoritative appearance on behalf of the company which assumed liability therefor.

Counsel for petitioners cite no case on their proposition that the Circuit Court of Appeals for the Seventh Circuit has held adversely to its opinion in this case. The fact is in the case of *Railway Steel Spring Co.* v. *Chicago & E. Ill. Ry. Co.*, 12 Fed. (2d) 430, 433, the court had a similar case before it and there stated:

> "It is also apparent that appellant took part in the proceedings in the state courts to the extent of petitioning the Supreme Court for a rehearing at a time when it alone was empowered to act in the name of the receiver who had long theretofore been discharged."

Petitioners overlook the rule that the purchaser need not be made a nominal party defendant because all those whose interests are involved and who conduct and control the defense are bound as real parties and are concluded by the judgment. In *Montgomery, et al.* v. *Vicory*, 110 Ind. 211 (214), 11 N. E. 38 (40) the court stated:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein."

This rule has been stated in *Washington Gas Light Co.* v.

D. C., 161 U. S. 316 (332-333), 40 L. Ed. 712 (720), and in *Robbins* v. *Chicago*, 4 Wall (U. S.) 657, 18 L. Ed. 427 (430).

In the case of *Shugart* v. *Mills*, 125 Ind. 445 (454), 25 N. E. 551 (554), it was pointed out that it is unnecessary to show by direct evidence that such a party took part in the former action, but it is enough to prove circumstances as fairly authorize the inference that they did take part; "for, in civil cases," as the court said, "conclusions may be inferred from facts established by a fair preponderance of the evidence."

Property may be followed through successive receivership. The plaintiff's claim has been adjudicated. *Smith, etc.*, v. *Mills*, 98 Ind. App. 543, 185 N. E. 327. A federal court will not relitigate the adjudication of the state court that a receiver in his official capacity was responsible for torts committed during his operations. *St. Louis U. T. Co.* v. *San Benito Land & Water Co.*, 4 F. (2d) 1007 (1010); *Penn General Gas Co.* v. *Penn*, 294 U. S. 189 (195), 79 L. Ed. 850 (855).

Certainly the plaintiff under the facts was entitled to have his judgment protected by a conclusion that plaintiff had a valid judgment binding both on the Northern Indiana Railway, Inc., and its receiver. The decision of the Circuit Court of Appeals for the Seventh Circuit certainly discloses that it is not contrary, but in harmony with the decisions of this Court, the decisions of its own and of the State of Indiana.

Point II.

The Decision of the Circuit Court of Appeals Is Not Contrary to Decisions of This Court.

Petitioners are in error when they state that the opinion of the Circuit Court of Appeals contravenes the case of *McNulta* v. *Lockridge*, 141 U. S. 327. The rule set forth on page 17 of petitioner's brief is not disputed, to-wit:

> "So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

But the rule is not violated in the case at bar. No order can be pointed to which requires payment from anything other than the property of the receivership. The order gave plaintiff a lien against the property and it is the only place plaintiff could look for payment. The question of discharge of a receiver as terminating all rights to continue pending litigation which could ripen into a lien against subsequent purchasers certainly is not involved in the *McNulta* case. The ruling cases which establish plaintiff's right are *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 37 (54), 52 L. Ed. 379 (386) and *State ex rel. Elder, et al.* v. *Circuit Court of Madison County, et al.*, 212 Ind. 1 (14, 15), 5 N. E. (2d) 641 (646, 647), all of which hold that courts always have the right to protect and enforce their own decrees and to that end retain jurisdiction over a cause. In the case at bar enforcement was left with the St. Joseph Circuit Court but the protection of the decree cannot be removed from the federal court.

POINT III.

The Decision of the Circuit Court of Appeals That the Judgment Rendered Against a Receiver of a Street Railway Corporation for Negligence Arising in the Operation of the Property, After His Discharge and After All the Trust Property Has Been Distributed by Him, Is Not Void, Is a Decision of an Important Question of Local Law, But Is Not in Conflict With Local Law.

The petitioners again under this point seek to have this Court hold that the respondent's judgment was void and cite in support of that proposition, three cases. In the case of *Johnson* v. *Central Trust Co.*, 159 Ind. 605, the question arose upon exceptions to a receiver's discharge. There was no question in that case concerning the effect of a reservation in a decree of foreclosure. The case of *Shepherd* v. *St. Louis Public Service Co.*, 64 Fed. (2d) 612, 615 is not contra to the case at bar as pointed out under Point I, because that Court stated the question turns upon the state law.

Throughout the appellees' brief, they have placed much reliance upon the case of *Henry* v. *Claffey*, 189 Ind. 609. In that case an answer in bar was filed to a complaint for personal injuries against a receiver setting up the discharge of the receiver, but in the instant case it specifically is disclosed that no such answer was filed to the suit of appellant. As stated by the Circuit Court of Appeals in its opinion that after chancing a trial in the state court, taking an appeal, paying all expenses and availing himself of the advantages from the delays occasioned by the appeals, he seeks now to claim the judgment is void. "A decent regard for consistency is conspicuous by its absence." Respondent's suit against the receiver proceeded to judgment, affirmed by the Appellate and Supreme Courts of Indiana, *Smith* v. *Mills*, 98 Ind. App. 543, 185 N. E. 327.

This action was not terminated by the discharge of the receiver in the Federal Court, and the transfer of the property because of the decree of the District Court in Consolidated Equity Cause No. 132, and legislative fiat found in Burns Indiana Statutes, Annotated, 1933, Sec. 2-227. Under such federal court decree and a state statute, the action of the state court was not terminated by the *discharge* of the receiver because the decree provides that liability for negligence claims not then reduced to judgment should be valid against the property. (R. 103, f.) The decree thereby specifically recognized further litigation in negligence claims, and the decree further provided: that for the purpose of enforcing the provisions of the decree, jurisdiction is retained, and the court reserved the right to retake and resell the property in case the purchaser shall fail to comply with orders of the court in respect to payment of liabilities (R. 103, g); that the property was sold free of all claims other than claims which may accrue after the entry of the decree (R. 104, h); that the purchasers or their assigns had the right to enter their appearance in this court and contest any claim or demand existing at the time of sale, and then undetermined, which would be chargeable against the property purchased (R. 104, i); and that all questions not disposed of were reserved for future adjudication (R. 105, l). Burns Indiana Statute, 1933, Sec. 2-227, provides:

> "that no action shall abate by the death or disability of a party or by the transfer of an interest therein, if the cause of action survives or continues, and in case of any other transfer of interest, the action *shall* be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action."

In the case of *Baer* v. *McCulloch*, 176 N. Y. 97, 68 N. E. 129, under approximately the same facts and a similar statute it was held that the action was not terminated by the discharge of the receiver, and the transfer of the

property so as to require the plaintiff to substitute the purchaser as defendant. The New York statute was not mandatory, as is the Indiana statute. The New York statute provides:

> "in case of transfer of interest, or devolution of liability, the action *may be* continued by or against the original parties; unless the court designates the person to whom the interest is transferred, or upon whom liability is devolved, but to be substituted in the action, or joined with the original party, as the case requires."

In *Henry* v. *Claffey,* so strongly relied upon, the effect of these transfer statutes heretofore mentioned were not determined. The cases are not similar. In the Henry case the plaintiff did not institute his action until the property had been sold under a previous order of court, and since the transfer occurred before the institution of the suit, the statute can have no application and the case, therefore, is no authority for appellees' position. Under the circumstances, as they exist in the Henry case, suit should have been instituted against the purchaser rather than the receiver, but under the circumstances as they exist in the suit at bar, appellant's action was properly instituted against the receiver at the time he was in actual operation and possession, and the only person against whom a suit could be validly filed. There is no showing in the case of *Henry* v. *Claffey* that a decree such as a decree in the case at bar, was entered. By virtue of the transfer statutes quoted, the fact that there was a transfer of interest during the pendency of the suit could not cause the action to abate. Again in *Henry* v. *Claffey,* the receiver filed his final report as such receiver, and was fully discharged from his trust before the amended complaint was filed, all of which matters were specially pleaded in the negligence case itself.

It has been repeatedly held that the Federal Court will

not relitigate the adjudication of a state court that the receiver in his official capacity was responsible for torts committed during his operations, and that the judgment against the receiver in a court other than the one appointing the receiver, conclusively establishes as against the receiver and the estate, the validity and amount of the claim; and as so cogently stated in *Central Trust Co.* v. *St. Louis A. & T. R. Co.*, 41 Fed. 551, and quoted in *Dillingham* v. *Hawk*, 60 Fed. 494, 23 L. R. A. 517 (520):

> "The right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this court."

Point IV.

The Decision of the Circuit Court of Appeals Which Holds That a Judgment Recovered After the Discharge of the Receiver and Without Substitution of the Purchaser Is Valid Against the Purchaser, Is Not in Conflict With the Applicable Local Decision of the Supreme Court of Indiana.

The law of this case is that the judgment of the plaintiff-respondent herein is a valid judgment. *Smith* v. *Mills*, 98 Ind. App. 543, 185 N. E. 327. At the time of the trial and at the time of the decision of that case this question certainly was in issue. The rule is that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

Dowell v. *Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

Grubb v. *Public Utilities Commission*, 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972.

Whitesell v. *Strickler*, 167 Ind. 602, 78 N. E. 845.

In re Appleman, 176 Ind. 253, 94 N. E. 566.

Henry, Rec., v. *Claffey*, 189 Ind. 609, so strongly relied upon by petitioners, has been adequately discussed under Point III and for brevity will not be further discussed at this point except to state that an answer was filed setting up the discharge in the negligence case, and there was no attempt at a collateral attack, as is being attempted in this case. Petitioners also cite the case of *National Metal Co.* v. *Greene Cons. Cooper Co.*, 11 Ariz. 108, 89 Pac. 535, but that case is not all in point because there no defense was made by the interested parties in the name of the nominal defendant as in this case. This Court has held that parties whose interests are involved and who conduct and control the defense are bound as real parties and are concluded by the judgment.

Washington Gas Light Co. v. *D. C.*, 161 U. S. 316 (332-333); 40 L. Ed. 712.

Robbins v. *Chicago*, 4 Wall. 657, 18 L. Ed. 427 (430).

Railway Steel Spring Co. v. *Chi. & Elkhart R. R. Co.*, 12 F. (2d) 430 (432-433).

Wilson v. *Brookshire*, 126 Ind. 497 (503), 25 N. E. 131 (133).

City of Anderson v. *Fleming*, 160 Ind. 597 (603-604), 67 N. E. 443.

Montgomery v. *Vicory*, 110 Ind. 211 (214), 11 N. E. 38 (40).

It is also the rule that a Federal Court will not relitigate the adjudication of a state court that the receiver in his official capacity was responsible for torts committed during his operations. *Penn General Gas Co.* v. *Penn*, 294 U. S. 189 (195), 79 L. Ed. 850 (855). *St. Louis U. T. Co.* v. *San Benito Land & Water Co.*, 4 F. (2d) 1007 (1010).

POINT V.

The Federal District Court Did Not Lose Jurisdiction by the Appointment of a Receiver in the State Court on December 28, 1931.

The petitioners cite five cases none of which are in point to maintain that because the property of the purchasing company was subsequently placed in receivership the Federal Courts have lost all jurisdiction. Briefly analyzed, the cases are as follows:

In *Lion Bonding Company* v. *Karatz*, 262 U. S. 77, 67 L. Ed. 871, the only question was as to jurisdiction between state and federal courts, and not as to reservation of jurisdiction.

In *Shields* v. *Coleman*, 157 U. S. 168, 39 L. Ed. 660, the receiver had been fully discharged and a bond substituted for the property. No question arose as to the retained jurisdiction in a decree such as in the case at bar.

In *Ex parte Baldwin*, 291 U. S. 610, 78 L. Ed. 1021, the petitioner sought to foreclose a right-of-way which would have affected a bankruptcy and would have the effect of ousting the bankruptcy court of jurisdiction that by the bankruptcy act had exclusive jurisdiction.

Likewise in *Field* v. *Kansas City Railway Co.*, 9 Fed. (2d) 213, no question as to reservation of power was involved, and of course action was not permitted which would interfere with possession by the receiver's court where the action was brought subsequent to the appointment of the receiver.

Jurisdiction does not depend upon actual possession of the *res*.

In the case of *In re Putnam*, 55 Fed. (2d) 73 (75), the court stated:

"Therefore the doctrine must rest upon the formal

> requisite that jurisdiction in suits *in rem* depends upon actual possession of the *res*—or power at any time to assume it—and that a scramble for possession would be an unedifying principle."

In the case of *Palmer* v. *Texas,* 212 U. S. 118 (129), 53 L. Ed. 435 (440), the Supreme Court stated that the rule is not restricted in its application to cases where property has been actually seized under jurisdiction possessed before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where in the progress of the liquidation the court may be compelled to assume the possession and control of the property to be affected.

As we have pointed out in the authorities cited by appellees' counsel, the court either had not retained jurisdiction or the proposed appointment of a receiver was not for the purpose of aiding the court in the enforcement of its own decree. Therefore, the statements and authorities have no application to the case now before the court in the sense that appellees' counsel wishes to have it applied. It was held in *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 35, 52 L. Ed. 379, that the exclusive jurisdiction of a Federal Circuit Court arising out of the possession of the *res* in a suit to foreclose a railroad mortgage may be continued, after the delivery of the property to the purchaser, under the foreclosure decree and the discharge of the receiver, by reserving in such decree jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise against the power of sale, as to prevent a state court from thereafter decreeing a sale of the property to satisfy the lien of certain equipment bonds in a suit begun before the property was taken into the possession of the Federal Court. The court said:

> "It appears, therefore, that the trial and judgment in the state courts were long after the federal courts had transferred the railroad property to the purchasers under the decrees for foreclosure and had discharged the receiver. Since the federal courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decree under which the property was sold and conveyed which preserved to the courts the control of the property for the purpose of giving full effect to its judgments."

The "something in the decree" which "preserved to the courts the control of the property for the purpose of giving full effect to its judgment" was a provision as follows:

> "The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist."

The court, in commenting on this decree, says:

> "It is obvious, therefore, that the court has parted with possession only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it."

The "something in the decree" which preserves to this Court the control of the property of the Chicago, South Bend & Northern Indiana Railway Company for the purpose of giving full effect to the decree of this court, is a provision much more specific than that in *Wabash Railroad Co.* v. *Adelbert College,* in the following words:

> 28. For the purpose of enforcing the provisions of this decree, jurisdiction of this cause is retained by this court, and the court reserves the right to retake and resell the property in case such purchaser or his successors and assigns shall fail to comply with any order of the court in respect to the payment of such

> principal indebtedness or liabilities within thirty days after service of a copy of such order, or if an appeal be taken from any such order within a period of twenty days after the service of notice of the entry of the order finally affirming such order on appeal.

Another provision in the decree in the case at bar was as follows:

> All liability for negligence claims not now reduced to judgment, against said Chicago, South Bend & Northern Indiana Railway Company, or against said Raymond R. Smith as receiver thereof shall be valid as against the property of said Railway Company at the sale herein ordered made to the same extent as though any judgment thereon had been recovered prior to the sale.

A clearer provision for the retention of jurisdiction to enforce such claims as that presented by the plaintiff could not have been written. It is also undisputable upon authority of *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 37, 52 L. Ed. 379, and *Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629, that this court parted with possession only conditionally and may now retake the property for the purpose of enforcing its own decree. The court first had jurisdiction of this property. This court ordered certain things done. Must this court now stand idly by and see those orders disregarded and violated? The law does not contemplate any such contempt of its orders.

The United States District Court was the first court of competent jurisdiction to take possession of the property of the Chicago, South Bend & Northern Indiana Railway Company. The property was thereby withdrawn from the jurisdiction of other courts. Especially in view of the express provision in the decree of this court retaining jurisdiction, this court should be able to control the property for the purpose of enforcing its own decree. The surrender of actual possession was only a conditional surrender. This court remains in constructive possession for the purpose of enforcing its own decree.

Petitioners have also overlooked the fact that respondent is entitled to have his claim determined in the Federal Courts. In the first place his rights arose pursuant to the decree of that Court and that the Federal Court has the exclusive right to determine respondent's rights. *Smith* v. *Missouri Pac. R. Co.,* 266 Fed. 653 (8th Cir.).

The fact that the Federal Court determines the respondent's rights does not interfere with jurisdiction of the St. Joseph Circuit Court. It has always been held that although a state court takes possession of the property of an insolvent corporation which was subject to mortgages by appointing a receiver, the Federal Court had jurisdiction of a suit to foreclose the mortgages because the foreclosing of the mortgages did not necessarily disturb the state court's possession of the property. *Brown* v. *Crawford,* 254 F. 146. This case follows *Watson* v. *Jones,* 13 Wall. 679, 20 L. Ed. 666, which certainly sustains the right of the Federal Courts to determine this controversy. See also *Byers* v. *McAuley,* 149 U. S. 607, 37 L. Ed. 867.

Point VI.

The Decision of the Circuit Court of Appeals Holding That Plaintiff Has a Lien on the Property Is Not in Conflict With Any Decision of This Court.

By a long stretch of imagination or the last visage of a hope, petitioners again take the position that the foreclosure decree did not grant a lien to persons in the situation of respondent. It was so clear to the Circuit Court of Appeals that it passed the question practically without comment. *Reihl* v. *Margolias,* 279 U. S. 218, certainly is far from sustaining petitioners' position. In fact, it is directly to the contrary and sustains respondent's position because this court points out that in the determination or recognition of a prior determination of the existence and amount

of indebtedness of the defendant to creditors seeking to participate, it does not deal directly with any of the property. This is exactly the situation of the case at bar and the Circuit Court of Appeals by its opinion strictly follow that case when it did not permit the respondent to *enforce* his lien on specific property, except upon application to the court now in possession of the *res*.

Upon the question of the plaintiff's lien, that has been adequately discussed and no further elaboration is necessary.

POINT VII.

The Girard Trust Co., Trustee, Has Had No Property Taken Without Due Process of Law.

Girard Trust Company, Trustee, is in no position to complain because this question has become moot since the institution of this action. The Girard Trust Co., Trustee, has agreed to a Plan of Reorganization in the State Court which provides that if plaintiff has a valid lien he shall be paid in cash. (See appended certified copy of Article III of Plan of Reorganization.)

Notwithstanding, however, Girard Trust Company's lien is inferior to the plaintiff's. Plaintiff's claim arose out of the negligent operation of a street railway.

McCullough v. *Union Traction Co.*, 206 Ind. 585 (600-603), 186 N. E. 300 (306) holds that such a judgment is prior even to pre-existing mortgages. That case and *Citizens Trust Company* v. *National Equipment Company*, 178 Ind. 167 (171), 98 N. E. 865 (866) approve the following statement:

> "It is said that 'every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' "

These cases are well reasoned and the Law of Indiana.

The reason for these rules are apparent in this case. $125,000 was paid to the Girard Trust Company; over $415,000 was spent on the line; and over $153,000 was turned over to the purchasing company—all arising from the receiver's operations. Damages incurred in the operation of a railroad in the hands of a receiver are generally considered operating expense. *McCullough* v. *Union Traction Co.*, 206 Ind. 585 (589), 186 N. E. 300 (305); *Brown* v. *Winterbottom*, 98 Ohio St. 127, 120 N. E. 292 (295). Notwithstanding this rule and these facts, the mortgagees and mortgagors seek and have been permitted to benefit from the income to the tune of over $675,000. They seek to hold these funds and the security free from all tort claimants. We submit that such result is not only without equity but directly contrary to authority.

Conclusion.

Petitioners have been unable to show wherein the decision of the Circuit Court of Appeals, complained of herein, is in any way contrary to or out of harmony with any ruling precedent of or any principle of law declared by any other Circuit Court of Appeals, this Court or the Courts of Indiana.

We have analyzed in this brief all the authorities cited by the petitioners in support of their application for writ of certiorari. These authorities include those relied upon by petitioner when the appeal was pending in the Circuit Court of Appeals. So irresistible are the facts and so well established and universally recognized are the rights in support of and involved in respondent's position and the principles of law applicable to the facts that the Circuit Court of Appeals in its clearly stated and logically reasoned opinion did not find it necessary to cite any precedent to support its irrefutable conclusions.

The authorities cited by petitioners in the brief in support of the writ of certiorari in addition to those relied upon in applicant's briefs on the appeal in the Circuit Court

of Appeals are so inapplicable and beyond the points involved that they indicate the weakness and untenableness of their position and irresistably leads to the conclusion as it did the Circuit Court of Appeals in its decision, which is being attacked, that the petitioners are still pursuing their condemnatory delay. The Circuit Court of Appeals chronologized the events chief of which some are:

Plaintiff's injury occurred February 19, 1928;

Suit instituted within four and one-half months;

Judgment of $12,500 recovered on December 22, 1930;

Judgment affirmed by Indiana Appellate Court April 26, 1933;

Motion to transfer denied Indiana Supreme Court April 26, 1934;

Suit to establish lien in U. S. District Court February 14, 1936;

Lien confirmed by Circuit Court of Appeals on January 22, 1940;

Petition for rehearing denied January 28, 1940.

Then the Court added these significant words which not only the above but subsequent events warrant:

> "While the time which these appeals have taken is quite nonunderstandable in this day when the law's delays have been so successfully overcome in other jurisdictions, we assume, and we are quite certain, that the delays were not all attributable to the courts. Experience has demonstrated that the art of postponement is highly developed by many in the legal profession and when well practiced is almost as effective as a good, valid defense."

We respectfully submit the petition should be denied.

Respectfully submitted,

ROBERT A. GRANT,
Attorney for Respondent.

LOUIS M. HAMMERSCHMIDT,
MILTON A. JOHNSON,
Of Counsel.